

MINUTES
FOR THE MEETING OF THE
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: September 15, 1999
TIME: 9:00 a.m.
PLACE: DLNR Board Room
Kalanimoku Building

Chairperson Timothy E. Johns called the meeting of the Commission on Water Resource Management to order at 9:17 a.m.

The following were in attendance:

MEMBERS: Mr. Timothy Johns
Dr. Bruce Anderson
Mr. David Nobriga
Mr. Herbert Richards, Jr.

EXCUSED: Mr. Brian Nishida
Mr. Robert Giraldo

STAFF: Ms. Linnel Nishioka
Mr. Roy Hardy
Mr. Ed Sakoda
Mr. Eric Hirano
Mr. Dean Nakano
Mr. Glenn Bauer
Ms. Lenore Nakama
Mr. David Higa
Mr. Dean Uyeno
Ms. Faith Ching

COUNSEL: Ms. Linden Joesting

OTHERS:

Steve Kubota
Charles Reppun
Rick Fontaine

George Hiu
John Reppun
Russell Yost

Manabu Tagomori
Karen Piltz
Kapua Sproat

All written testimonies submitted at the meeting are filed in the Commission office and are available for review by interested parties. The items were not taken in the order posted on the agenda.

1. Minutes of the July 21, 1999 meeting

The minutes of the July 21, 1999 meeting were deferred because not all of the Commission members were present who were at that meeting.

2. Old Business/Announcements

Deputy Director Linnel Nishioka made note of the agenda that the Commissioners would be briefed on the Waiahole Contested Case Hearing Decision and Order and the Hydrology/Engineering Technical Advisory Committee Report. This report was requested at the June 1999 meeting. The Commission asked that the report be completed within 90 days. On another follow up of the June 1999 meeting was an item on KSBE's Waiawa's application on the issue about closing the public hearing. At this point, Deputy Director Nishioka stated that no recommendation has been made because KSBE is still talking with ADC and leeward landowners. A recommendation will be forthcoming at a future date. Deputy Director Nishioka stated that continuance of the dialogue is much appreciated in lieu of a contested case hearing.

Chairperson Johns asked if there is a follow up to the TAC report from July on Commissioner Anderson's request for a written response to USGS comments.

Deputy Director Nishioka stated that Glenn Bauer is working on a detailed response and that it will probably be mailed this week.

3. Briefing on the Waiahole Contested Case Hearing (CCH-OA95-1)

Mr. Ed Sakoda stated that the purpose of this briefing was to review the decision and order.

Chairperson Johns added that the reason that this briefing was requested was that most of the Commissioners were not on board when that decision was made in December 1997. It would be helpful to review the decision and order with the Commissioners.

4. Joint Preliminary Report of the Hydrology Technical Advisory Committee and the Engineering/Agriculture Technical Advisory Committee

PRESENTATION OF SUBMITTAL: Mr. Edwin Sakoda

Mr. Sakoda made one correction to the report. On page 3 paragraph G last sentence should read section IV.C not IV.F. Mr. Sakoda also showed a slide presentation.

Russell Yost of the University of Hawaii stated that some of the members are deeply concerned because they are on both the proposal and members of the technical advisory committee that in fact, should be completely impartial and they want to meet commitments in both categories. If there is consideration of the proposal in some way, then perhaps they will make sure that they are not part of any decision making in that category.

Chairperson Johns stated on behalf of the Commission that they are gratified by their sensitivity to the ethics code and concerns for a possible conflict. The potential for conflict are inevitable because of the various interests groups. Ultimately, it will be a Commission decision. The Commission is not a rubber stamp. The committee's recommendation will not be accepted without going through a detailed analysis by staff and the Commission in making a decision.

Chairperson Johns discussed the possible funding of the project. Letters were sent to Congress to obtain additional funds for studies that might help obtain information related to the report.

Mr. Sakoda stated that obtaining funds from collecting fees from the leeward water users is pending a Supreme Court decision since the legality of those fees were challenged in the appeal. In the aquatic resources area, Mr. Sakoda stated that the Division of Aquatic Resources has initiated studies that will assist us along these lines. The Louisiana State University is doing a study and has included Waiahole Stream as a point in monitoring. Additional funding to supplement that project is being looked into. Other avenues are being explored if fees cannot be obtained from the users.

Commissioner Richards stated that monies should be available from the Legislature. He suggested that staff should sort this out and lobby to make sure that there are funds available in the next Legislature to help carry out the recommendations stated in the report.

Chairperson asked what should be done to move this project forward (i.e. accept report or ask to do an implementation plan based upon these recommendations)? He stated that it would be difficult to evaluate which recommendation should be pushed forward without any knowledge of the funding or if there are any funding.

Deputy Director Nishioka stated that this is the preliminary report from the committee and what we need to do is to look at implementation of the plan, obtain costs for some of the items, and find further information about the possibility of federal funding. Now that ADC is the manager of the Waiahole Ditch, they have the authority to charge the users. The only issue is whether there can be an additional charge by the Commission that would fund the studies that we are discussing. That issue is with the Supreme Court.

TESTIMONIES:

Kapua Sproat of Earthjustice stated that after reading the report, the concerns she came up with are the same as the Commission (i.e. funding, approval and implementation) and that she supports the proposal. She will provide testimony suggesting how she and the people she represents would prioritize the various recommendations.

Charlie Reppun stated that ADC should be responsible for any funding and that if the Commission does any work, then the Commission should be reimbursed for their work. Mr. Reppun also stated that NRCS could also be tapped for funding.

Commissioner Nobriga replied that the Windward district would have to be involved as one of the sponsors. They could get funds, not ADC. Through the district, ADC can be the cosponsors under P.L. 566.

Mr. John Reppun stated that tremendous progress has been made. The more we all have common goals, the less political all of this becomes. He felt that a management plan is needed for the entire system with ADC being part of that plan. He stated that there are many sources of funds and different parties can go after those funds. He supports the idea of a grant.

Mr. Steve Kubota of the Ahupua'a Action Alliance made comment from a more general prospective on the question of funding and strategy. They themselves are using the ahupua'a model. The coral reef funding implicates the value of ecosystem restoration with coral reefs. The National Coral Reef Initiative with the international is looking at land use impacts. There are funds there that may be obtained. The other big source of funding is the EPA. The EPA did recognize the Ala Wai Canal project using the ahupua'a model. Other sources of possible funding are through the federal government and Hawaii Tourism Authority (HTA). HTA is looking into agricultural tourism.

Deputy Director Nishioka commented on John Reppun's idea of convening a community government task force to talk about the types of federal funding that we would tap into. She stated that she has been talking to DOH, NRCS, and the Army COE on how to obtain federal funding. Most of federal funding is tied into a particular project. It is not general funding for operational expenses and the federal funding; tends to be project oriented. Deputy Director Nishioka also consulted with the Division of Aquatic Resources on possible Dingell-Johnson funding for projects. Through the D-J program, the federal government does a 3-1 match on state funds. She stated that she would like to convene a task force some time this year.

Chairperson Johns suggested that Deputy Director Nishioka incorporate the comments received today from the Commissioners and testifiers. He announced that written comments should be submitted from others who did not testify so that when we move to implementation that we have as much input as possible and that we are not missing any information. Deadline should be 1 month and if more time is needed, a request should be directed to the Commission staff.

Commissioner Richards stated that the Commission should accept this report of the TAC and instruct staff to prioritize, study and make note of the comments received today.

MOTION: (Richards/Anderson)

To accept the Preliminary Report of the Technical Advisory Committee.

UNANIMOUSLY AGREED.

5. Proposed Adoption of Penalty Guideline (G99-01)

PRESENTATION OF SUBMITTAL: Deputy Director Linnel Nishioka

Deputy Director Nishioka stated that the primary purpose of the penalty guideline is for staff to come out with unified consistent recommendations on what type of penalties are appropriate for violations of the Water Code and permit conditions. It is an internal management document. It is not binding on the public. It is for the Commission staff to use as a guideline for recommendations to the Commission. It is not a binding recommendation on the Commission. The Commission has the ultimate authority to either vote for a penalty that is higher or lower than what will be recommended by the staff. This is the first guideline that Commission staff will be implementing therefore, as the staff goes through the process of implementing these guidelines, staff will probably need to come back to the Commission at a later time to amend portions of the guidelines.

Chairperson Johns asked if the Attorney General's Office had time to go over the guidelines.

Deputy Attorney General Linden Joesting reviewed the guidelines and the statute in the case law. These guidelines do not constitute rules that have to come under Chapter 91 of the Hawaii Administrative Procedures Act. This is because the guidelines do not affect private rights of, or procedures available to the public, and these guidelines pertain to the internal management of an agency. For those reasons Deputy Attorney General Joesting stated that the guidelines do not equal rules and are not subject to Chapter 91, Hawaii Revised Statutes.

Commissioner Anderson stated that one of the main concerns of DOH is to be sure that the penalties imposed offsets any financial gain that the violator may have. The penalty should not be so that someone would willfully violate the penalty. The minimum penalty should be equal to offsetting whatever the financial gain might be. It is not too clear in the guidelines. He suggested that the guideline be worded in that the penalty should be based to offset any economic gain that has resulted from the violation.

Chairperson Johns pointed out that to calculate the penalty, some description of what kind of criteria or what kinds of factors to take into account when the minimum is not used or when the minimum might not be used should be indicated in the policy.

Deputy Director stated that the factors that Commissioner Anderson pointed out would be used but agreed with Chairperson Johns that a sentence of such will be incorporated into the policy.

RECOMMENDATIONS:

Staff recommends that the Commission adopt the Penalty Guideline (G99-01; shown in Exhibit 1).

TESTIMONIES:

Mr. Steve Kubota stated that the Ahupua'a Action Alliance supports the intent of staff's recommendation. He pointed out that he wants to recommend to the Commission that the issue of violations be put in a context of a larger policy. Coming from the Water Use and

Protection Plan, he stated that the Commission is supposed to encourage protection and not just the use. General permit process should be explained to community groups.

Chairperson Johns requested that staff looks into how violations are determined. In general, what steps are made before it elevates to being determined a recommendation that a violation was made. He also asked that at a future Oahu meeting he would like to be briefed on how the procedure escalates (i.e. informal notice of violation, etc.).

Commissioner Anderson recommended that if it is in writing, it should be in 2 separate documents, 1) penalty policy, and 2) enforcement policy.

MOTION: (Richards/Nobriga)

To accept the Commission's Penalty Guideline (G99-01) with the additions noted by Commissioner Anderson.

UNANIMOUSLY AGREED.

6. John W. Miller/Koohio Reality Trust, VIOLATION OF WELL CONSTRUCTION PERMIT, Koohio Well (Well No. 1221-01), TMK 5-1-4:34, Kilauea Aquifer System, Kauai

PRESENTATION OF SUBMITTAL: Ms. Lenore Nakama

RECOMMENDATIONS:

Staff recommends that the Commission:

1. In accordance with the Penalty Guideline (G99-01), impose a \$500 cash fine on the permittee.
2. Withhold acceptance of a pump installation permit application until the fine has been paid in full.

MOTION: (Nobriga/Anderson)

To approve the submittal.

UNANIMOUSLY APPROVED.

7. City and County of Honolulu, Department of Design and Construction, Stream Channel Alteration Permit (SCAP-OA-289), Removal of Abandoned Concrete Piers, Kawainui Stream, Kailua, Oahu (TMK 4-2-02:001)

PRESENTATION OF SUBMITTAL: Mr. Edwin Sakoda

RECOMMENDATIONS:

That the Commission approve a stream channel alteration permit for the removal of five abandoned piers at Kawainui Stream (TMK 4-2-02:001), Oahu, subject to the Commission's standard conditions for stream channel alteration permits.

MOTION: (Nobriga/Richards)
To approve the submittal.
UNANIMOUSLY APPROVED.

Chairperson Johns adjourned the meeting at 12:45 pm.

Respectfully submitted,

FAITH F. CHING
Secretary

APPROVED AS SUBMITTED:

LINNEL T. NISHIOKA
Deputy Director